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No. 06-

IN THE

Supreme Court of the United States

DANNY T. BARNES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Defense Officer Personnel Management Act ("DOPMA"), 10 U.S.C. § 611 *et seq.*, provides that military officers who are nominated by the President and confirmed by the Senate "shall be promoted" to the next higher rank unless they are notified that their promotion has been delayed (and therefore that their name may be removed from the promotion list) before the projected effective date of that promotion, unless such notification is impracticable, in which case notice must be given as soon after the projected date as is practicable. The questions presented are:

I. Whether the Federal Circuit erred in summarily concluding that it was impracticable to timely notify Petitioner of the delay in his promotion simply because he was at sea when it is undisputed that he received at least two official e-mails while deployed and was also reachable by telephone, fax, and electronic message.

II. Whether giving effect to the plain language of DOPMA violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

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Danny T. Barnes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-13a) is reported at 473 F.3d 1356. The memorandum and order of the Court of Federal Claims on reconsideration (Pet. App. 14a-40a) is reported at 66 Fed. Cl. 497. The original memorandum and order of the Court of Federal Claims (Pet. App. 41a-81a) is reported at 57 Fed. Cl. 204.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 2007. Petitioner filed a timely application for an extension of time to file this petition on March 23, 2007. The Chief Justice granted that application, extending the time to file this petition to May 4, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . but the Congress may by law vest the Appointment of such inferior Officers, as they may think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

The Constitution also provides:

> The Congress shall have the power [t]o raise and support Armies . . . ; [t]o provide and maintain a Navy; [t]o make rules and regulations for the Government and Regulation of the land and naval Forces

> . . . [and] [t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."

U.S. Const. art. I, § 8.

The texts of 10 U.S.C. §§ 611, 618, 624, 629, and 741, and the Secretary of the Navy's regulation, SECNAVINST 1420.1A (1989), are reproduced at Pet. App. 122a-167a.

STATEMENT OF THE CASE

The Court of Appeals agreed in a prior case that the issue presented in the petition raises "significant questions concerning the appointment process for military officers." *Dysart v. United States*, 369 F.3d 1303, 1306 (Fed. Cir. 2004) (reprinted at Pet. App. 82a-106a). Most significantly, this case raises the question whether the plain language of DOPMA — the statute governing military promotions — violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The plain language of DOPMA provides that officers who are nominated for promotion by the President, confirmed by the Senate, and given projected promotion dates by their Service Secretaries are appointed unless they are given statutorily sufficient notice that their promotions are delayed and are then removed from the promotion list within the reasonable, statutorily-prescribed time period. The Court of Appeals nonetheless adopted a tortured interpretation of this clear statutory scheme to avoid what it perceived to be constitutional problems otherwise arising from DOPMA's plain meaning.

The Court should grant review to restore Congress' clear intent in enacting DOPMA and to preserve the rights of thousands of military officers to be promoted in accordance with a clear statutory scheme. Because the question presented generally arises only in the Federal Circuit, the decision below effectively creates a nationwide rule. Absent re-

view, the decision will therefore subject qualified military officers to unwarranted denials or delays of promotion. It will do so contrary to the plain language of DOPMA and Congress' equally clear goal of creating an efficient appointment process for the maintenance of the modern military. And it will do so based on the mistaken constitutional concern that *Marbury*, rather than simply describing the nature of the appointment at issue in that case, instead created an inflexible rule governing *all* appointments over two centuries later.

A petition raising the same principal question presented here is pending before the Court. *See Lewis v. United States*, No. 06-1289 (hereinafter "*Lewis* Pet."). Petitioner respectfully requests that this Court hold his petition pending its decision in *Lewis*. If the Court grants certiorari in *Lewis*, the Court should grant this petition and consider consolidating the cases for argument.

Here, petitioner was not properly notified that his promotion was going to be delayed before the effective date of that promotion. In *Lewis*, the petitioner was not removed from the promotion list until after the statutorily-prescribed time period for such action had passed. The cases are effectively bookends of the DOPMA promotion process. In both cases, the Federal Circuit held that appointments had not been effectuated under DOPMA. Taken together, these cases show not only that this question is recurring but also that regardless of whether the Government's failure to comply with DOMPA occurs at the beginning or the end of the appointment process, the Federal Circuit's interpretation of that statute in *Dysart* continues to result in unwarranted denials of promotion. Further percolation of the question presented is neither necessary nor warranted. The Court should grant review.

A. The Statutory Scheme

This case concerns the meaning and constitutionality of DOPMA, Pub. L. No. 96-513, 94 Stat. 2839 (1980), codified at 10 U.S.C. § 611 *et seq.* (signed into law by President Carter, with technical amendments signed by President Reagan).[1] DOPMA was proposed by the Department of Defense ("DOD") in order to modernize the military's officer personnel law. *See* S. Rep. No. 96-375, at 75 (1980); H.R. Rep. No. 96-1462, at 47 (1980), *partially reprinted in* 1980 U.S.C.C.A.N. 6333. The House Committee on Armed Services likewise recognized that DOPMA's predecessor statute "was drafted at a time when lawmakers could not have foreseen the requirements for large, ready forces on a[] sustained basis" and therefore did not address management issues faced by the modern military. H.R. Rep. No. 96-1462, *supra*, at 9. DOPMA was a reaction to that problem, and, according to the DOD, would "provide the services a more equitable, effective, and efficient system to fill officer force structure requirements and manage the officer corps." *Id.* at 56.

DOPMA's efficient and uniform system governing the promotion of military officers is needed more today than it was when DOPMA was enacted. Literally thousands of officer promotions occur every year in the services. *See, e.g.*, 152 Cong. Rec. D1088 (daily ed. Nov. 9, 2006). DOPMA, which governs all such promotions, ensures that they take place when needed to ensure the readiness of our military in the modern era. There can be no question but that DOPMA falls within Congress' core powers. *See* U.S. Const. art. I, § 8 ("The Congress shall have power . . . [t]o raise and support armies . . . [t]o provide and maintain a Navy . . . [and]

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[1] Certain of DOPMA's provisions that are not relevant here were amended in 2006. *See* John Warner Nat'l Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006). Citations herein refer to the prior version of the statute.

[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.").

DOPMA comprehensively prescribes the "appointment" of military officers selected for promotion. It provides that "[a]ppointments . . . shall be made by the President, by and with the advice and consent of the Senate" except in the case of certain low-ranking officers not at issue in this case. 10 U.S.C. § 624(c) (further providing that appointments to the rank of first lieutenant or captain in the Army, Air Force, or Marine Corps, or to lieutenant (junior grade) or lieutenant in the Navy "shall be made by the President alone").[2] The appointment process begins when the Secretary of the relevant military service determines that it is necessary to convene a selection board to recommend the selection of active-duty officers for promotion to the "next higher permanent grade." *Id.* § 611(a). The selection board prepares a report recommending officers for promotion, which is reviewed by the Secretary of the appropriate service, who then forwards the report to the Chairman of the Joint Chiefs of Staff (for certain officers) and to the Secretary of Defense (for all officers). *Id.* §§ 618(a)(1), (b)(1), & (c)(1). The Service Secretaries are not required to accept a report of the selection board and may return the report to the board for further proceedings. *Id.* § 618(a)(2). Likewise, the Chairman may make comments and return a report to the Secretary concerned or in certain circumstances may return the report to the selection board for further proceedings. *Id.* §§ 618(b)(3), (4).

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[2] DOPMA governs promotions for members of the Army, Air Force, Navy, and Marine Corps. The implementing regulation, *see* SECNAVINST 1420.1A, tracks the statute. Similar statutory schemes govern promotions of officers in the Coast Guard, *see* 14 U.S.C. § 271 *et seq.*, and of reserve officers in the Army, Air Force, Navy, and Marine Corps. *See* 10 U.S.C. § 14001 *et seq.*

Once a report is approved by all pertinent officials, the Secretary of Defense transmits it to the President for approval or disapproval. *Id.* § 618(c)(1). The President may remove the name of any officer recommended for promotion on the selection board's report. *Id.* § 629(a).

The list of officers approved for promotion by the President is then submitted to the Senate for its advice and consent. *Id.* § 629(b). If the Senate does not confirm an officer, his or her name is removed from the list. *Id.* If the Senate confirms the officer, on the other hand, he or she "*shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed." *Id.* § 624 (a)(2) (emphasis added).

The Secretary of the relevant service thereafter sets the officer's actual date of "appointment," which is also the effective date of the officer's promotion to the next grade. *Id.* § 741(d)(2) ("Except as otherwise provided by law, the date of rank of an officer who holds a grade *as the result of a promotion is the date of his appointment to that grade.*") (emphasis added); *see also id.* § 624(b)(2). The Secretary informs officers of the projected effective date of their appointment and promotion by transmitting the confirmed promotion list to appropriate personnel. If the Secretary takes no further action, the officer's appointment occurs on that date. *Id.* § 741(d)(2).

The Secretary also has authority to delay the date of an officer's appointment. *Id.* §§ 624(d)(1), (d)(2). For example, the Secretary may delay the appointment if there is "cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." *Id.* § 624(d)(2).[3] DOPMA further provides that

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[3] DOPMA also provides that:

> [t]he appointment of an officer *may not be delayed under this subsection unless the officer has been given written notice of the grounds for the delay*, unless it is impracticable to give such written notice *before the effective date of the appointment*, in which case such written notice shall be given as soon as practicable.

Id. § 624(d)(3) (emphases added).

Under the plain language of the statute, then, an officer who is not informed of a delay before the effective date of his appointment — or as soon thereafter as practicable if it was impracticable to inform the officer of the delay before the effective date — is appointed.[4]

> Under regulations prescribed by the Secretary concerned, the appointment of an officer under this section may be delayed if -- [] sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of; [] an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer; [] a board of officers has been convened under chapter 60 of this title to review the record of the officer; or [] a criminal proceeding in a Federal or State court is pending against the officer.

10 U.S.C. § 624(d)(1).

[4] During any period of delay, the Secretary has the authority to decide whether to retain an officer on the promotion list. 10 U.S.C. §§ 624 (d)(1), (d)(2); SECNAVINST 1420.1A ¶ 23(e). Under authority delegated by the President, the Secretary may remove an officer's name from the promotion list during the statutory delay period. SECNAVINST 1420.1A ¶ 23(e); *see also, e.g.*, *Lewis v. United States*, 458 F.3d 1372, 1379 (Fed. Cir. 2006) (reprinted at Pet. App. 107a-121a) (agreeing that the President can delegate both the authority to appoint military officers and the authority to decline to appoint officers) (collecting cases).

DOPMA also creates a maximum period of delay of eighteen months from "the date on which the officer otherwise would have been appointed." 10 U.S.C. § 624(d)(4). At the end of that eighteen-month pe-

Notably, the original version of the statute provided only that "[t]he appointment of an officer" could not be delayed "unless the officer ha[d] been given written notice of the delay." 94 Stat. 2858 (1980). In adding the impracticability exception in 1981, Congress recognized that in some cases officers who it was not practicable to reach before their promotion dates might be promoted simply because they had not been timely notified of a delay. H.R. Rep. No. 97-141, at 14 (1981), *reprinted in* 1981 U.S.C.C.A.N. 24, 37. The legislative history thus confirms the understanding discussed above — that officers not informed prior to their projected promotion date that their appointment is to be delayed will be appointed.

The Secretary's decision to set an effective appointment date and failure to follow clear statutory procedures to delay an officer's promotion, therefore, are the only post-confirmation Executive Branch actions required to effectuate the appointment of an officer to the next permanent grade. DOPMA contemplates that the Executive's failure to comply with its reasonable requirements regarding promotion delays constitutes the exercise of executive discretion in favor of appointment. *See* 10 U.S.C. § 624(a)(2) ("Except as provided in subsection (d) [the delay provision], officers on a promotion list for a competitive category *shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed.") (emphasis added). The historical record confirms that the Executive Branch fully understands this operation of the statute. Legal memoranda from Joseph Califano, a special assistant to President Lyndon B. Johnson, advised President Johnson to

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riod, unless the officer's name has first been *removed* from the promotion list, that officer is unambiguously promoted under the statute. *See id.* § 624(a)(2). The officer is likewise formally appointed on that date. *Id.* § 624(d)(4); *see also id.* § 624 (b)(2); *Lewis* Pet. at 5-8.

take action on the promotion of certain officers prior to their projected promotion dates or those officers would be "automatically appointed" under DOPMA's predecessor statute. *See* JA 364-66.[5] Indeed, as we shall explain, the government has more recently conceded in litigation conducted in the Court of Federal Claims that, when DOPMA's procedures are not followed, appointments are effectuated as a matter of course.[6]

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[5] Citations to the "JA" refer to the Joint Appendix in the Court of Appeals. The memoranda were obtained from the Lyndon Baines Johnson Library and Museum. *See, e.g.*, JA 365, Dec. 16, 1965 Mem. from Joseph Califano to Pres. Johnson ("Based on these circumstances it is recommended that you remove these officers from the promotion list on the ground that they are not qualified for promotion. [Redacted] will be automatically promoted on December 20 and [redacted] December 18 unless you act before these dates.") (redactions in original); JA 366, Feb. 10, 1966 Mem. from Joseph Califano to Pres. Johnson ("Unless you take the recommended removal action before February 15, 1966 [redacted] will be automatically promoted.") (redaction in original); *see also* JA 364, Dec. 13, 1965 Mem. from James Cross for Joseph Califano ("Presidential approval for the withdrawal of [officers'] names will be necessary in the case of Lieutenant [redacted] before 18 December and for Captain [redacted] before 20 December. These are the dates when the officers complete the service required for advancement to the next higher permanent grade.") (redactions in original).

[6] This operation of DOPMA does not saddle the armed forces with flawed officers. After an officer is promoted, the President and the Service Secretaries of course retain the power to dismiss or otherwise discipline those officers. *See, e.g.*, 10 U.S.C. § 625 (providing that the President may vacate promotions to Brigadier General and Rear Admiral (lower half) within eighteen months after promotion); *id.* § 801 *et seq.* (providing for dismissal and other sanctions pursuant to the Uniform Code of Military Justice); *id.* § 1161(b) (providing that the President may drop a commissioned officer from the rolls in certain circumstances); *id.* §§ 1181, 1182 (providing for boards of inquiry to determine whether an officer should be retained on active duty).

B. Factual Background

The petitioner, Danny T. Barnes, enlisted in the United States Navy in 1983. He rose through the ranks and was promoted to Lieutenant in 1992. He was then selected on schedule for promotion to Lieutenant Commander in the Cryptology competitive category. The President nominated him to that rank on October 29, 1997. 143 Cong. Rec. S11390-91 (daily ed. Oct. 29, 1997). He was confirmed by the Senate on November 8, 1997, *id.* at S12214-15 (daily ed. Nov. 8, 1997), and given a projected promotion date of April 1, 1998. JA 403.

On February 4, 1998, however, the Naval Security Group Command transmitted a report to the Chief of Naval Personnel of a non-judicial punishment proceeding ("NJP") against Mr. Barnes conducted in 1997 at Naval Security Group Activity ("NSGA") Misawa, Japan. The Commander of the Naval Security Group Command recommended that Mr. Barnes be removed from the Lieutenant Commander promotion list and required to show cause for retention in the naval service.[7] JA 383. Subsequently, the Deputy Chief of Naval Operations was informed that Mr. Barnes would not be included on the April 1, 1998 transmission listing officers who had been promoted. JA 384. On March 17, 1998, a memorandum from the Chief of Naval Personnel to Mr. Barnes stated his April 1, 1998 promotion was being delayed. The memorandum noted the NJP and stated that the promotion was delayed until "all related administrative or disciplinary

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[7] The NJP was held on November 24, 1997, and Mr. Barnes was awarded seven days' restriction. Based on the NJP, Mr. Barnes' Commanding Officer recommended that his promotion to Lieutenant Commander be delayed so that he would be the last officer promoted in his year group. Because he "ha[d] the potential to be a strong, positive asset for the Navy," his Commanding Officer did not recommend that his promotion be withheld or that he be required to show cause for retention in the Navy. JA 78.

action [was] completed." JA 46. A certified mail receipt indicates that this memorandum was sent to Mr. Barnes via NSGA Misawa, where he was stationed, on March 23, 1998. JA 385.

At that time, Mr. Barnes was deployed to the USS *John S. McCain* in the Persian Gulf. On March 30, 1998, while still at sea, he was informed by e-mail that a Board of Inquiry would be conducted regarding his retention in the Navy. He was not, however, informed that his promotion, scheduled to take place the next day, had been delayed.[8] JA 405. On April 9, 1998, *over a week after Mr. Barnes' projected promotion date*, the Executive Officer at NSGA Misawa sent an e-mail to the Bureau of Naval Personnel ("BuPers") to inform it that he had received the letter stating Mr. Barnes' promotion would be delayed and a package regarding the Board of Inquiry but did not want to mail Mr. Barnes these documents because he was concerned that they would be delayed or that Mr. Barnes would be on his way back by the time the letters reached the *McCain*. JA 114.

The government has never disputed that Mr. Barnes was reachable aboard the *McCain* by a variety of means other than regular mail, including e-mail, fax, telephone, and electronic message. JA 403-05. Indeed, while still at sea, he was informed by e-mail from NSGA Misawa on April 15, 1998, *two weeks after his projected April 1 promotion date*, that his promotion was being delayed. JA 406. Mr. Barnes did not receive the memorandum notifying him of the delay and the grounds for it until he returned to NSGA Misawa from the *McCain* on April 21, 1998, *three weeks after his projected promotion date*. JA 114. Thus, although the Navy had known about the reasons underlying Mr. Barnes' promo-

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[8] Indeed, beginning on his projected promotion date of April 1, 1998, Mr. Barnes received pay at the higher rank of Lieutenant Commander for approximately one year but was later asked to repay the difference. JA 406.

tion delay since November 1997, it did not take action to delay his promotion until March 1998, did not notify him in any way of his promotion delay until two weeks after his projected promotion date even though he was reachable at sea before that date, and did not give him the official memorandum setting forth the grounds for the delay until yet another week had elapsed.

Mr. Barnes submitted a response to the promotion delay on April 25, 1998 that included supporting letters from his superiors.[9] On May 27, 1998, the Board of Inquiry determined that Mr. Barnes had engaged in conduct unbecoming an officer but recommended that he be permitted to remain in the Navy. JA 125-26. Nevertheless, in a series of procedurally deficient steps, the Navy further extended his promotion delay, JA 130, and ultimately removed his name from the promotion list. JA 132. In 2001, Mr. Barnes was again passed over for promotion and was released from active duty. JA 145, 151. He became a member of the Naval Reserve, from which he resigned in 2003. JA 149-50.

C. Procedural History

1. On October 21, 1999, Mr. Barnes filed suit in the Court of Federal Claims, alleging, *inter alia*, that his promotion occurred as a matter of law because the delay did not comport with statutory and regulatory procedures and that he was therefore entitled to back pay and reinstatement in the

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[9] For example, the Commanding Officer of the *McCain* wrote: "I awarded LT Barnes a Navy Achievement Medal for his superb performance while aboard the JOHN S. MCCAIN. . . . Promote LT Barnes to LCDR now and only assign him to the most challenging billets." JA 117-18. The ship's Executive Officer also supported Mr. Barnes' promotion, stating: "LT Barnes has been a tremendous asset to this command and to the overall mission of this battle group as a whole. . . . Based on his superior performance at this command, I highly endorse his promotion to Lieutenant Commander and future retention in the Naval service." JA 119.

Navy.[10] That court granted Mr. Barnes' motion for judgment on the administrative record, rejecting the government's argument that Mr. Barnes was not promoted because the President has ongoing discretion to remove an officer's name from the promotion list at any time. Pet. App. 74a-76a. The Court found several defects in the Navy's handling of Mr. Barnes' promotion to Lieutenant Commander and, with respect to whether Mr. Barnes had been timely notified of the initial delay of his promotion, observed that "[c]learly communication via email was possible" while he was at sea. Pet. App. 68a.

At the time the Court of Federal Claims reached its decision in this case, another decision of that court fully supported Mr. Barnes' reading of DOPMA. *Rolader v. United States*, 42 Fed. Cl. 782 (1999), held that an officer whose name was never removed from the promotion list before the last possible date of statutory delay had been "promoted" under DOPMA — precisely the reading Mr. Barnes asserted regarding the Navy's improper actions in his case. Indeed, the government conceded the point in *Rolader*. *See id.* at 786 (stating that "[t]he Government *concedes* that if no recommendation for removing plaintiff's name from the promotions list was initiated prior to [the last date of possible delay], he was *automatically promoted*, irrespective of the subsequent removal") (emphases added).

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[10] The Court of Federal Claims had Tucker Act jurisdiction because Mr. Barnes sought back pay under the Military Pay Act, 37 U.S.C. § 204. While this case was pending before that court, Mr. Barnes applied to the Board for Correction of Naval Records ("BCNR") for a determination that he had been promoted to Lieutenant Commander because the Navy failed to follow the required procedures in delaying his promotion. The litigation was stayed pending resolution of the BCNR proceedings. The BCNR denied his application and also denied on reconsideration. JA 48-49, 51-52.

2. While proceedings regarding the appropriate amount and nature of relief continued in Mr. Barnes' case, the government took precisely the opposite view in *Dysart*, persuading the Federal Circuit in that case that an officer whose name is removed from the promotion list after the prescribed statutory period has ended is *not* promoted under DOPMA because DOPMA does not provide for appointments. *Dysart* held that the President has discretion under DOPMA to remove an officer's name from the list at any time. 369 F.3d at 1311, 1315-17 (deciding issue without reference to contrary Court of Federal Claims precedent). This holding was driven by the Federal Circuit's belief that a decision interpreting DOPMA according to its plain language would raise questions regarding the Appointments Clause and the interpretation of *Marbury v. Madison*. *See Lewis* Pet. at 12-13, 23-28. The Federal Circuit concluded that interpreting DOPMA in the manner Dysart proposed — as providing for the promotion of a nominated, confirmed officer unless statutory procedures for removing the officer's from the promotion list are complied with — would impermissibly encroach on executive power and violate *Marbury*. *Dysart*, 369 F.3d at 1314; *see also Lewis*, 458 F.3d at 1378-79.[11]

3. Following *Dysart*, the Federal Circuit reversed the lower court in this case, summarily concluding (without any citation to the record) that providing Mr. Barnes with notice of the delay before the effective date of his promotion was impracticable because he was at sea. Pet. App. 11a. Without explaining why a harmless error analysis was even appropriate, it also concluded that even if there was a procedural defect, it was harmless: "Barnes did not suffer any prejudice, as he promptly submitted his written response as soon as he

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[11] On the basis of this intervening precedent, the Court of Federal Claims reconsidered its prior decision in this case. Pet. App. 17a. The court vacated its prior holding that Mr. Barnes had been promoted under DOPMA in light of *Dysart* but granted relief on other grounds.

returned to Japan." Pet. App. 11a. Finally, the Court of Appeals rejected Mr. Barnes' cross-appeal in which he asked the Court to reconsider its *Dysart* decision *en banc*. Pet. App. 13a.

REASONS FOR GRANTING THE PETITION

This case, *Lewis*, and others like them raise significant and recurring questions regarding how military officers are promoted — questions that potentially impact thousands of officers each year and require analysis of whether DOPMA violates *Marbury* and the Appointments Clause by creating a statutory scheme that provides for an efficient and modern appointments process. The Federal Circuit's interpretation of the statute is deeply flawed and rests on an erroneous premise regarding the separation of powers and *Marbury*. Properly understood, DOPMA neither vests Congress with any appointment power nor encroaches on the power of the Executive Branch. The statute clearly has the effect that Mr. Barnes attributes to it, and that effect is compatible with the Constitution.

Because it has exclusive jurisdiction over claims asserted by military officers seeking back pay, the Federal Circuit is in all likelihood the only court of appeals that will have the opportunity to pass on this issue. Absent review, its decisions, including the decision below, will wrongly inject uncertainty into an area where certainty and predictability are paramount; thousands of officers proceed through the military promotions system each year, and the efficiency of this system is integral to the national defense effort. There is no chance that the Federal Circuit will correct its own error in interpreting DOPMA. In this case, the Federal Circuit based its decision on a casual and blatantly incorrect holding regarding whether DOPMA's notice provision had been complied with in an effort to avoid grappling with the implications of its decision in *Dysart*. Pet. App. 12a (stating that it would reach neither the government's nor Mr. Barnes' ar-

guments based on *Dysart*). Twice since *Dysart*, the Court of Appeals has unequivocally refused to revisit that decision and thus reaffirmed that petitioner's reading of DOPMA violates *Marbury* and the Appointments Clause. The Court should grant the petition.

I. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

A. The Question Is Recurring

Literally thousands of military appointments take place each year. From January 3 through September 30, 2006 alone, the Senate confirmed 7,783 Air Force nominees, 8,831 Army nominees, 6,694 Navy nominees, and 1,289 Marine Corps nominees. *See* 152 Cong. Rec. D1088 (daily ed. Nov. 9, 2006). DOPMA governs the appointment of all active duty military officers. It is hardly surprising that the question presented here is a recurring one. To the contrary, this Court currently has before it another petition raising this very question and — as this case itself demonstrates — it has repeatedly been the subject of litigation in the Court of Federal Claims and the Federal Circuit. *See, e.g.*, Pet. App. 1a-106a (reproducing the three lower court decisions in this case); *Lewis*, 458 F.3d 1372; *Dysart*, 369 F.3d 1303; *Rolader*, 42 Fed. Cl. 782; *see also Law v. United States*, 11 F.3d 1061 (Fed. Cir. 1993) (raising same issue under statute governing Coast Guard promotions). These questions also regularly arise before the BCNR and its sister boards for the other armed forces. *See, e.g.*, Amicus Br. of Mr. Barnes, et al., in *Dysart v. United States*, 2003 WL 24305578, at *3.

B. The Question Is Important

The Federal Circuit acknowledged that these cases "present[] significant questions concerning the appointment process for military officers." *Dysart*, 369 F.3d at 1306. As explained in Dr. Lewis' petition, the Court of Appeals is correct on that score. *See Lewis* Pet. at 15-17.

First, this case implicates the interpretation of an important federal statute governing the appointment of thousands of military officers every year. In *Dysart* and *Lewis*, the Federal Circuit disguised what is essentially a constitutional holding that DOPMA violates *Marbury* and the Appointments Clause as a holding that DOPMA's plain terms mean something other than what they say. The outcome of this case was a foregone conclusion given that interpretation.

But the Court of Appeals' interpretation cannot survive serious scrutiny. DOPMA provides that Mr. Barnes was "appointed" to the next higher rank on his projected promotion date because he was not previously given proper statutory notice of the delay, nor was it impracticable for the Navy to give him such notice. The Court of Appeals' holding that any defect in the notice given Mr. Barnes was harmless error flows from its misreading of the statute as failing to provide for automatic appointments. The prejudice to Mr. Barnes — the loss of a valuable promotion resulting in his subsequent involuntary release from active duty — is clear when the statute is read in a straightforward fashion. The Federal Circuit's holding also illustrates the limbo in which its interpretation of DOPMA places military officers — that interpretation imposes a system under which the President or his delegate can delay military promotions and remove officers from the promotion list at any time without regard to DOPMA.

Second, this case raises core questions about the separation of powers. The statutory scheme is critical to maintaining an efficient military appointment process, and the appointment of military officers is unquestionably an area in which Congress has a significant interest in light of its broad constitutional powers to maintain a navy and regulate other military affairs. *See* U.S. Const. art. I, § 8. In *Lewis* and *Dysart*, the Federal Circuit made clear that it viewed DOPMA as encroaching on Executive power. That court, however,

did not even acknowledge that in enacting DOPMA Congress was legislating in an area involving its core powers or consider the possibility that DOPMA is a balanced approach to military promotions that respects the appointments system and also carries out Congress' duty to provide for and regulate the armed forces. *See Lewis* Pet. at 15-17.

Third, these cases raise the issue whether *Marbury* created an inflexible constitutional rule regarding what Executive action is necessary to effectuate any and all appointments under the Constitution. The Federal Circuit based its analysis on a flawed reading of *Marbury*. It did not grapple with the question whether Congress could vary in any way the way in which the steps in the appointment process are accomplished. The Court should grant review to determine whether *Marbury*'s *description* of the appointment at issue in that case in fact created a baseline constitutional rule governing all appointments over two centuries later.

C. Absent The Court's Review, The Court Of Appeals' Decision Creates A Nationwide Rule Governing The Appointment Of Military Officers

Claims like Mr. Barnes' are litigated exclusively in the Federal Circuit, because it is the only court with jurisdiction to hear appeals regarding officers' claims for back pay and retirement pay at the level applicable to the ranks to which they assert they were promoted. *See* 28 U.S.C. §§ 1295(a)(2), (3); *see also United States v. Hohri*, 482 U.S. 64, 72 (1987); *Lewis* Pet. at 17-18. —

Two judges of the Court of Federal Claims, including in this case, have read DOPMA to provide for military promotions without raising any constitutional issues. *See* Pet. App. 76a (holding that the Navy's delay in removing Lieutenant Barnes from the promotion list until after the statutory delay period had expired "accomplished his promotion"), *opinion vacated*, 66 Fed. Cl. 497 (reversing prior holding in light of *Dysart*), and *Rolader*, 42 Fed. Cl. at 787 (holding that be-

cause officer's name was not removed from promotion list prior to the expiration of the delay period, he was promoted as a matter of law).

The Federal Circuit nevertheless decided *Lewis* solely based on its prior holding in *Dysart* and denied rehearing. *See Lewis*, 458 F.3d at 1379 (resolving Dr. Lewis' argument that she had been promoted because her name was not removed from the promotion list by the last possible date of statutory delay based on *Dysart* because *Dysart* was binding on the panel and "Lewis' claim is not distinguishable"). The Federal Circuit refused to reconsider *Dysart* again here and engaged in no analysis of DOPMA's language at all. *See* Pet. App. 13a ("Barnes himself recognizes that this panel is bound to follow *Dysart* unless and until it is overturned by the court sitting en banc. We therefore do so and reject the cross-appeal. Nor are we persuaded, as requested, to propose en banc review ourselves."). The Federal Circuit has thus conclusively demonstrated that it will not revisit this issue. Absent review, the decision below will create a *de facto* nationwide rule.

II. THE DECISION BELOW WRONGLY SUBJECTS THOUSANDS OF MILITARY OFFICERS TO UNWARRANTED PROMOTION DENIALS AND DELAYS

A. DOPMA's Plain Language Provides For Appointment When Notice Of A Delay Is Not Properly Given

In this case, the Federal Circuit refused to reconsider its flawed interpretation of DOPMA as set forth in *Dysart*.[12] Under the plain language of DOPMA, an officer nominated for promotion by the President, 10 U.S.C. §§ 618(c)(1),

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[12] The flaws in the Federal Circuit's interpretation of DOPMA are discussed in greater detail in Dr. Lewis' petition. *See Lewis* Pet. at 19-22.

629(b), considered and confirmed for that office by the Senate, *id.* § 629(b), and assigned a projected promotion date by a Service Secretary, *id.* §§ 624(b), 741(d), is appointed on his projected promotion date absent statutorily sufficient notice that his appointment will be delayed. *Id.* § 624(d). Such notice must be given prior to the officer's projected promotion date and, absent notice, the officer will be promoted on that date unless giving prior notice is impracticable. *Id.* § 624(d). The notice provision ensures that officers are timely informed of any change in their promotion status and is merely a reasonable limitation on the statutorily-recognized executive power to delay or prevent the effectuation of a promotion.

The history of the notification provision confirms this understanding. When DOPMA was passed in 1980, it provided only that "[t]he appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the delay." 94 Stat. 2858. This language was amended in 1981, when Congress added the phrase "unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable." Defense Officer Personnel Management Act Technical Corrections Act, Pub. L. No. 97-22 § 4(d)(3)(D), 95 Stat. 127. The House Report to that amendment noted that under the language of the original provision, an officer might be promoted simply because notice of a delay had not been transmitted to him or her in a timely fashion:

> This amendment recognizes that information calling into question the qualifications of an officer for promotion may be revealed only shortly before the projected date of the promotion and that, in such cases, the officer may not be reasonably available (e.g., on a weekend, while on leave or while absent

> without leave) to receive written notice that the promotion is being delayed.

H.R. Rep. No. 97-141, *supra*, at 14. This impracticability exception would be meaningless under the Federal Circuit's reading of the statute. If notice were not necessary *at all* to delay or prevent the effectuation of a scheduled promotion, Congress would have had no reason to add an impracticability exception.

The Federal Circuit considered neither the plain language of DOPMA nor the legislative history of the notice provision in reaching its decision in this case, constrained as it was by its opinion in *Dysart*. As discussed below, the constitutional concerns underpinning that decision are unfounded.

B. DOPMA Does Not Violate The Appointments Clause

The Federal Circuit's strained statutory construction in *Dysart*, which has since been reaffirmed in *Lewis* and the decision below, was colored by the underlying premise of its decision — namely, the court's belief that the statute raised Appointments Clause problems because: (1) the President has absolute discretion regarding whether to appoint an officer who has been confirmed to the next highest rank and grade; and (2) the "shall be promoted" language of the statute improperly cabins that discretion. *See, e.g.*, *Lewis*, 458 F.3d at 1378-79 (noting that in *Dysart* the court "further held that the statute could not constitutionally provide for automatic appointment because 'military officers must be appointed pursuant to the constitutional process, which requires appointments at the discretion of the President, not automatic appointments pursuant to statute'") (quoting *Dysart*, 369 F.3d at 1315); *Dysart*, 369 F.3d at 1314 (stating that "[p]rotecting the role of the President in the appointment process from legislative encroachment was in fact one of the goals of the Constitutional Convention"); *see also id.* at 1316 ("The Constitution contemplates that, after confirmation, the

President may refuse to execute the appointment."). Under the Federal Circuit's view of the Appointments Clause, therefore, no limits may be placed on the President's discretion to appoint or choose not to appoint officers. As discussed more fully in Dr. Lewis' petition, that view is incorrect. *See Lewis* Pet. at 23-29.

First, this Court has held that the Appointments Clause is violated when Congress enlarges its own power during the appointments process. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that Congress could not constitutionally provide for appointment of members of the Federal Election Commission by the President *pro tempore* of the Senate and the Speaker of the House). DOPMA does not involve any expansion of congressional power. The only power Congress retains under the statute is the Senate's power to confirm (or choose not to confirm) military officers. Contrary to the Federal Circuit's view, the President and his delegates maintain their discretion. The critical decisions at issue under the scheme — whether to nominate an officer for promotion, whether to allow the promotion of a confirmed officer to go through as scheduled or to delay that promotion, whether to remove the officer's name from the promotion list during any delay, and of course whether to remove or discipline an officer who has already been promoted — all still rest with the Executive. All DOPMA requires is that notice of a delay be given before the effective date of an appointment unless it is truly impracticable to do so, and that executive discretion be exercised within a reasonable time frame.

Second, rather than violating the separation of powers, DOPMA instead strikes a necessary balance between the President's power in the area of appointments and Congress' core constitutional power to provide for and regulate the military. This Court "ha[s] never held that the Constitution requires that the three branches of Government operate with absolute independence." *Morrison v. Olson*, 487 U.S. 654,

693-94 (1988) (internal quotation marks omitted). When proposing and enacting DOPMA, the DOD and Congress both recognized the need for an efficient, modern process to manage the high volume of promotions in today's military. *See* S. Rep. No. 96-375, *supra*, at 75; H.R. Rep. No. 96-1462, *supra*, at 9, 47, 56. The reasonable procedures governing military promotions set forth in the Act are simply mechanisms to ensure that this need is met and thus fall squarely within Congress' core powers. *See* U.S. Const. art. I, § 8.[13]

Third, DOPMA does not violate *Marbury*. The Federal Circuit was wrong to assume that *Marbury* requires the appointments process to occur in a particular manner.[14] *Mar-*

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[13] If there were any doubt about this conclusion, it is resolved by the fact that Congress has greater flexibility in the appointment of inferior officers like Mr. Barnes. *See, e.g., Weiss v. United States*, 510 U.S. 163, 186-87 (1994) (Souter, J., concurring). In particular, Congress may vest the appointment of these officers in the President alone or in other government entities. U.S. Const. art. II, § 2, cl. 2. The Federal Circuit in *Dysart* recognized that Congress may vary the appointments process for such officers, 369 F.3d at 1314, but utterly failed to address the import of this fact for the appointment of military officers. It is true that Congress has not chosen to vary the appointment process for most military officers. However, given its greater power to disregard the role of the President in the appointments process for inferior officers altogether, it follows that Congress must, at the very least, have the flexibility to set up a scheme for the appointment of officers that ensures all the constitutionally required steps of the military promotion process occur as efficiently as possible. That is all that it has done with the current statutory framework.

[14] Under the Federal Circuit's interpretation, giving the President unfettered discretion in appointments, Congress would never be able to craft efficient appointments schemes and the statutes currently providing similar mechanisms for appointments in the Coast Guard and the reserve officer corps, *see* 14 U.S.C. § 271 *et seq.* and 10 U.S.C. § 14001 *et seq.*, would be unconstitutional. Moreover, taking the Federal Circuit's position to its logical extreme, Congress would never be able to require that military officers have any particular qualifications for their positions as the Executive Branch would have unlimited decision-making power regarding who is nominated and appointed to be an officer. As even the

bury does not create any rule, much less a *constitutional* rule, regarding the precise action required to effectuate an appointment under all circumstances. Rather, it generally provides that an appointment is made "when it is shewn that [the President] has done every thing to be performed by him." *Marbury*, 5 U.S. at 157.[15] Mr. Barnes and other officers like him are nominated by the President under a statute that the President understands will make a confirmed officer's appointment effective unless the officer is properly notified of a delay and his or her name is then removed from the promotion list. Thus, the President's nomination and the Executive's failure to take subsequent action that complies with statutory procedures to delay or prevent the appointment is the showing *Marbury* requires — that the President "has done every thing to be performed by him." *Id.* (also stating that "this [appointment] power has been exercised when the last act, required from the person possessing the power, has been performed").

III. THE COURT CAN REACH THE STATUTORY AND CONSTITUTIONAL ISSUE IN THIS CASE

The Federal Circuit's cursory conclusion that it was impracticable to afford Mr. Barnes prior notice poses no impediment to this Court's review of the important issues discussed above. The impracticability exception to DOPMA's normal notice requirement was intended to apply to officers who are not at their place of duty for one reason or another, not to those who are on duty and capable of being reached.

Court of Appeals has acknowledged, that is simply not the law. *See Lewis*, 458 F.3d at 1379 (recognizing that "Congress can restrain the President's authority to appoint particular classes of persons to officer positions or bar appointment unless particular procedures are followed").

[15] Moreover, *Marbury* dealt with a particular appointment process; it did not foreclose the possibility that other processes could also satisfy the requirements of the Appointments Clause.

See H.R. Rep. No. 97-141, *supra*, at 14. The Federal Circuit nonetheless rested its decision on the notion that it was impracticable to notify Mr. Barnes of the delay of his promotion before the effective date because he was at sea. Pet. App. 11a. Because the facts surrounding provision of notice to Mr. Barnes were undisputed, the Federal Circuit's impracticability determination is a legal conclusion subject to *de novo* review. *E.g.*, *Imperial Cas. & Indem. Co. v. Chicago Housing Auth.*, 987 F.2d 459, 461 (7th Cir. 1993) (requirement that notice be served "as soon as practicable" subject to analysis as matter of law if facts are undisputed); *see also SMS Data Prods. Group, Inc. v. United States*, 853 F.2d 1547, 1553-54 (Fed. Cir. 1988) (interpreting "practicable" *de novo* according to plain meaning).

There is no dispute that the Navy could have communicated with Mr. Barnes when he was aboard the *McCain*. Indeed, it did communicate with him, sending him at least two official e-mails during his deployment, including one on March 30, 1998 regarding the Board of Inquiry. JA 405, 406.[16] To comply with the statutory notice requirement, the Navy could simply have sent him another such e-mail before his April 1, 1998 projected promotion date. Furthermore, it had telephone, fax, and electronic communication with the *McCain* at all pertinent times.[17]

The fact that an officer in Japan thought there were reasons to defer providing Mr. Barnes that notice, *see* page 11,

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[16] "On or about March 30, 1998, while I was still aboard the *McCain*, NSGA Misawa advised me by email that my case was being referred to a Board of Inquiry (BOI). There was no mention of a promotion delay. . . . On April 15, 1998, while I was still aboard the *McCain*, NSGA Misawa advised me by email that my promotion had been delayed." JA 405-06.

[17] Mr. Barnes confirmed this in his uncontested declaration. "The ship also had fax and email capability. During the time I was aboard, there were no interruptions in the *McCain*'s ability to communicate with the rest of the Navy." JA 405.

supra, is irrelevant. *E.g.*, American Heritage Dictionary 882 (4th ed. 2000) (impracticable means "*impossible* to do or carry out") (emphasis added); Random House Webster's Unabridged Dictionary 962 (2d ed. 2001) (impracticable means "*incapable* of being put into practice *with available means*") (emphases added); *see also* Pet. App. 68a. DOPMA requires an inquiry into whether notice was practicable, not whether an officer subjectively considers notice practicable.[18] The Federal Circuit's impracticability determination here was plainly wrong, and should not be permitted to insulate the court's otherwise incorrect decision from review.[19] The

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[18] This Court had occasion last Term to consider two different uses of the term "practicable" in Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 836 (2000) ("UCMJ"). One required the President to prescribe regulations for military tribunals that "so far as he *consider[ed]* practicable" complied with the laws and rules generally recognized for the trial of criminal cases in the district courts; the other simply stated that all rules and regulations for military commissions and courts-martial "shall be uniform insofar *as* practicable." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2790 (2006) (emphases added). The Court observed that a determination as to whether something *is* practicable is different from a determination as to whether something is *considered* practicable. *Id.* at 2790-92. Because DOPMA requires notice before the effective date of a promotion "unless it *is* impracticable," 10 U.S.C. § 624(d)(3) (emphasis added), it falls in the former category and determinations under it are entitled to reduced deference, if any. *See Hamdan*, 126 S. Ct. at 2792 & n.51; *see also id.* at 2801 (Kennedy, J., concurring) (difference between the two UCMJ subsections "suggests, *at the least*, a lower degree of deference for . . . determinations" under the second subsection) (emphasis added). No amount of deference saves the Navy's failure to give prior notice in this case because the Navy was in communication with the *McCain* (and therefore Mr. Barnes) at all times.

[19] The Federal Circuit's alternative holding that any defect in the notice Mr. Barnes received was harmless, Pet. App. 11a, assumes the correctness of its interpretation of DOPMA. If DOPMA does not provide for appointments where the delay provisions have not been complied with, as the Federal Circuit held in *Dysart* and reiterated in *Lewis*, then a failure to give notice of a delay prior to a projected promotion date could indeed be harmless because the officer would have no expectation of

Court should resolve the Court of Appeals' clear errors and grant review to reach the important main issue presented.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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appointment under the statute. But if DOPMA *does* provide for appointments, as Mr. Barnes contends and as the Court of Federal Claims held initially here and in *Rolader*, the error cannot be harmless. As the Court of Federal Claims correctly recognized, the prejudice is "self-evident": the improper notice led to "improper delays in [Mr. Barnes'] promotion, the subsequent removal of his name from the promotion list and consequent imputed nonselection and involuntary termination from the Navy." Pet. App. 26a.